IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE R.S.O. 1970, CHAPTER 318, AS AMENDED

AND IN THE MATTER OF TWO COMPLAINTS LAID BY HAROLD E. HALL AGAINST INTERNATIONAL FIREFIGHTERS ASSOCIATION LOCAL 1137 THE ETOBICOKE PROFESSIONAL FIREFIGHTERS ASSOCIATION AND A COMPLAINT AGAINST THE BOROUGH OF ETOBICOKE FIRE DEPARTMENT

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BOARD OF INQUIRY

Bruce Dunlop

APPEARANCES

Julian Polika -	Counsel for the Ontario Human Rights Commission
Ross Dunsmore -	Counsel for the Borough of Etobicoke
Howard Goldblatt -	Counsel for the Etobicoke Professional Firefighters Association, Local 1137, International Association of Firefighters.

BASIS OF COMPLAINT

Harold E. Hall was a district chief and Vincent Gray was a captain in the Fire Department of the Borough of Etobicoke. In 1973, pursuant to an agreement with the Etobicoke Professional Firefighters' Association, Local No. 1137, International Association of Firefighters, the Borough enacted By-law 2852, changing the normal retirement age for firefighters from 65 to 60. Prior to 1973 there had been different retirement ages applicable to different personnel because, when Long Branch, New Toronto and Mimico amalgamated with Etobicoke in 1967 the existing arrangements in the four municipalities were continued in respect of the personnel to whom they then applied. Long Branch, where Mr. Hall was deputy chief, and New Toronto, where Mr. Gray was a captain, had retirement ages of 60, whereas Mimico and Etobicoke had 65. Thus By-law 2852 did not really affect the retirement age applicable to Mr. Hall and Mr. Gray but merely standardized the retirement age for the whole department. In any case, Mr. Gray was required to retire at the end of August and Mr. Hall at the end of September in 1976.

Mr. Hall and Mr. Gray lodged complaints with the Ontario Human Rights Commission alleging breaches of the Ontario Human Rights Code by the Borough and the Association. The complaints against the Borough alleged breaches of s. 4(1)(b) of the Code which provides that "no person shall ... dismiss or refuse to employ or to continue to employ any person ... because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee." The Association was alleged to be in breach of the same provision and also of s. 4(1)(g), which prohibits discrimination "against any employee with regard to any term or condition of

employment" and s. 4a(1) which provides that "no trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member", on any of the bases already mentioned.

PRELIMINARY ISSUES

The complaints were heard on Tuesday, May 17, and Monday, May 30, 1977. At the outset, Mr. Dunsmore, on behalf of the Borough raised a number of preliminary issues including the question of the Board's jurisdiction. With the consent of Mr. Dunsmore and Mr. Goldblatt, who supported on behalf of the Association two of Mr. Dunsmore's submissions, I reserved decision on these issues and proceeded to hear evidence on the merits of the complaints. Before dealing with the merits in these reasons, however, I should indicate my conclusions on the preliminary issues.

The argument that the Board lacked jurisdiction was based on s. 7(5) of the Fire Departments Act, R.S.O. 1970, c. 169, as amended, which provides for the arbitration of differences arising between parties "relating to the interpretation, application or administration of an agreement made under section 5", the section which makes provision for collective bargaining between firefighters and municipal councils. It was argued that the complainants should have resorted to the grievance procedure in the collective agreement and thereafter should have submitted the matter to arbitration. This would not have been an easy route for the complainants to follow inasmuch as both the Association and the Borough were vigorously opposed to their position. Apart from this, however, the matter is not just a private dispute between parties to a collective agreement. It raises an issue of public importance and general concern provided for by statute

and the right of individuals to complain, and of the Commission to inquire cannot be restricted by a collective agreement and is not limited by s. 7(5) of the Fire Departments Act. An alleged breach of the Human Rights Code is not simply "a difference ... between the parties relating to the interpretation, application or administration of an agreement".

Mr. Dunsmore also wondered whether notice of the proceedings should be given to the Ministry of Treasury, Economics and Intergovernmental Affairs, pursuant to s. 14 of the Ontario Municipal Employees Retirement System Act, R.S.O. 1970, c. 324, as amended, which authorizes employers to enact by-laws to participate in the Ontario Municipal Employees Retirement System (OMERS) and provides that no by-law or resolution passed under this authority may be amended or repealed without the approval of the Ministry. However, having proceeded to hear the complaints without giving notice to the Ministry it is a bit late for me to conclude that they should receive it and I must content myself with the rationalization that a decision of this Board to the effect that a by-law offends the Ontario Human Rights Code does not constitute amendment or repeal.

Other issues raised as preliminary matters were also issues towards which evidence and argument were subsequently directed and I shall dispose of them in dealing with the merits of the complaints.

THE AGE DISCRIMINATION ISSUE

It is evidently now common for Ontario municipalities to have agreements with their firefighters calling for compulsory retirement at the age of 60. Estimates by various witnesses ranged from 60% to 85% of municipalities.

The essential issue is whether or not this constitutes discrimination on the basis of age and if the estimates given are accurate it is an issue of no small importance. For the purpose of the Code, age means "any age of forty years or more and less than sixty-five years". At first blush, requiring someone to retire at age 60 would thus appear to offend the Code. On the other hand, by virtue of s. 4(6) discrimination does not offend the Code where "age, sex, or marital status is a bona fide occupational qualification and requirement for the position or employment". It is contended that this exemption applies in the case of firefighters because the occupation is physically strenuous and hazardous and the ability to cope with its requirements diminishes as one grows older.

It was conceded that not all firefighters have lost the capacity to meet the requirements of the job by the time they reach the age of 60. Indeed, it was conceded that Messrs. Hall and Gray still possessed the necessary capacity when they reached retirement age. It was agreed, as well, that a firefighter might possibly lose the capacity even before reaching the age of 60. One could probably conclude, therefore, that physical and mental capacity rather than age should be regarded as the "bona fide occupational qualification and requirement". It was contended, however, that no satisfactory method of assessing capacity was available and that the only solution was to choose an admittedly arbitrary cut-off point that would minimize the risks to the individuals concerned, their colleagues and the public that might arise out of the loss of capacity attributable to aging. Sixty, it was argued, was the appropriate age and thus being no more than 60 was a bona fide occupational qualification and requirement.

One of the first things the Board must determine is the meaning of the expression "bona fide" as applied to an "occupational qualification and requirement" in the context of an anti-discrimination statute. One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age. The exception in s. 4(6) recognizes that for some jobs people from forty to sixty-four may be too old. The meaning of "bona fide" that seems most consistent with this objective would be "real" or "genuine" i.e. that there is a sound reason for imposing an age limitation, and the onus of establishing this justification for discrimination is on the person alleging it to be justified.

The conclusion of the Board is that the evidence falls short of establishing in this case that it is a bona fide occupational requirement of firefighters that they be no more than sixty years of age.

ANALYSIS OF EVIDENCE

The most compelling witness on the issue of the age requirement was the deputy chief of the Etobicoke Fire Department, Mr. J. Ross Bissell. It was Mr. Bissell's view not only that firefighters should be allowed to retire at the age of 60 but that they should be required to do so. Mr. Bissell certainly convinced me, as he obviously convinced others when he was an executive member of the Ontario Firefighters Association, that

firefighters should be allowed to retire at age 60. His evidence did not, however, convince me that firefighters should be required to retire at age 60 and that the age was a bona fide occupational qualification and requirement.

No-one could dispute the proposition that as one gets older one slows down. One could probably take notice of the fact that this process begins somewhere in the thirties. It is, for example, an exceptional athlete who can still meet the requirements of professional employment beyond the age of forty. On the other hand, the test that is usually applied in sports is the test of ability and not the test of age. One looks to see whether the football player can still run or block or catch passes; whether the baseball player can throw and hit; whether the hockey player can skate and shoot. One recognizes that a thirty year old player may be approaching the end of his career or may still have six or eight good years left. Mr. Bissell said, however, as did Mr. John DeVaal, Director of Personnel for the Borough, that no tests had been developed for determining the capabilities of firefighters to continue to perform effectively and safely. If this be so, it is difficult to see how one could say with any confidence that the age of 60 was the point beyond which a sufficiently high proportion of firefighters could no longer perform effectively and safely as to make retirement at this age a bona fide condition and requirement of the job.

Mr. Bissell's reasons for concluding that 60 was an appropriate age (indeed, his preference would be for a system under which firefighters would work for thirty years and then retire regardless of age) were, it seemed to

me, primarily impressionistic. He indicated that when he was an active member of the local and provincial associations it became obvious as they got older that they wouldn't want to be out fighting fires at the age of 65 and they felt justified in pressing for a retirement age of 60. He stated that there is a great deal of excitement and tension involved in responding to a fire, that it involves moving from a state of inactivity to one of violent activity under conditions of potential danger and that it becomes more difficult the older one gets. Recovery time becomes longer.

While these are all sound reasons for allowing a firefighter to retire at the age of 60 they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe. Mr. Bissell referred to health and safety symposia where the issue of the physical demands of firefighting had been discussed, to discussions various local associations have had with medical officers of health to find out the effect of firefighting on the human body, to tests on firefighters that have been conducted at the University of Notre Dame in the United States, to statistics being gathered by the Toronto Fire Department and to other indications of professional medical interest in considering the problem area. No precise scientific evidence was presented, however.

Mr. DeVaal, who participated in contract negotiations with the Association on behalf of the Borough, indicated that the most significant factors in persuading management to accept the 60 age limit were the fact that the majority of fire departments in the province seemed to have

accepted it and the fact that it would make the Etobicoke retirement age uniform. The third reason given by Mr. DeVaal was that, according to the union, firefighting was a "young man's game" but he agreed that management had been presented with no precise evidence in support of this proposition.

Mr. John Carney, an acting captain with eighteen years experience in the Etobicoke Department, who was secretary of the Association at the time the agreement on compulsory retirement at age 60 was reached said that the provision was discussed by the membership of the Association and that the main reason for supporting it was bringing the retirement ages into line. The hardship involved in performing the strenuous work as one got older was also discussed.

It would appear, therefore, that the Etobicoke decision was based largely on the view that, like shorter working hours and higher pay, early retirement appealed as a desirable benefit of a rigorous job. The decision was not unaffected by the generally held view that firefighting is a "young man's game" but was not based on any scientific conclusion that there was a significant increase in the risk to individual firefighters, to their colleagues or to the public at large in allowing firefighters to work beyond the age of 60.

Among the cases cited by Mr. Goldblatt in a thorough and informative brief was Hodgson v. Greyhound Lines, Inc. (1974) 499 F 2d 859. This is a decision of the United States Court of Appeals, 7th Circuit dealing with the burden of proof on the defendant to establish that age was a bona fide occupational qualification justifying the defendants refusal to hire drivers over forty years of age. It is to be noted that the defendant in the case produced what the Court called "an array of evidence to

substantiate its claim" including testimony by transportation industry officials, former high ranking officials of the Interstate Commerce Commission and Greyhound officers but also including medical testimony and statistical evidence. Medical evidence on both sides of the issue was devoted to the question of the type of degenerative changes caused by aging, their detrimental impact on driving skills and their capacity for being detected through testing. The Court found that Greyhound had discharged the burden on it but the evidence was much more extensive, scientific and precise than the evidence received by this Board.

If firefighters are to be required to retire at age 60, as opposed to being allowed to retire at age 60 as they may now do for example, in the City of Toronto, attempts should be made to develop a medical justification. It seems to me that the necessary evidence may not now be available because the necessary scientific attention has yet to be paid to the problem. That may be the reason there are no known tests of a firefighter's capacity.It may well be that all that exists for the time being is impressions like those of Mr. Bissell which, although based on years of experience, are not sufficiently precise to justify an arbitrary, mandatory retirement age of 60.

OTHER DEFENCES

A proposition put by Mr. Dunsmore as a preliminary issue and supported by Mr. Goldblatt was that the complainants, having operated under a pension by-law that had for many years provided for their retirement at age 60, having operated under a collective agreement to the same effect since 1973 and not having raised the issue until shortly before their own retirement could not now be heard to complain. The evidence subsequently established the factual basis for this argument quite clearly. Indeed, it

is probably true to say that the complainants would not have raised the issue even then had they not felt that their pensions would be inadequate. Nor would either have raised the point had he not become aware of the decision of Professor S.N. Lederman in the case of Hadley and The City of Mississauga.

At the time the collective agreement was entered into in 1973 Mr. Hall and Mr. Gray were already subject, as noted, to compulsory retirement at age 60 and the collective agreement did not result in any change in their position. It is difficult to see what they could have done prior to the date of their retirement and prior to their discovery that there might be a legal basis for resisting except possibly to establish a record of unhappiness about the situation. Thus neither laches nor estoppel should operate against them. They may even at one time, have been entirely happy with the prospect of retirement at age 60 but unless they are contractually bound not to, I think they are free to change their minds in light of current circumstances. And I do not think that one can contract out of the protection of the Ontario Human Rights Code, nor that a trade union can do it on one's behalf, whether or not one supports the position taken by the trade union at the time. If it were possible to contract out of what must be considered basic human rights, or if it were possible for a trade union to do so on one's behalf, the effectiveness of the legislation could be seriously undermined.

It is my conclusion, then, that the arrangement in this case offends the Ontario Human Rights Code. Two questions remain: which parties have offended which sections of the Code and what ought the remedy to be?

WHICH PARTIES HAVE OFFENDED THE CODE?

The only complaint against the Borough is that it contravened s. 4(1)(b) by dismissing or refusing to employ or to continue to employ the complainants because of age. It is my conclusion that the Borough is in breach of this section.

Both complainants alleged that the Association is also in breach of s. 4(1)(b) and that in addition it is in breach of s. 4(1)(g) and s. 4a(1). However, I do not find the Association in breach of any of these provisions, because quite apart from anything that the Association did, the complainants were subject to a compulsory retirement age of 60. In effect, there is no causal connection between the Association's activities and the complainants' plight. If the Association had supported the complainants' position perhaps things might have been different, although Mr. DeVaal testified that the Borough had never allowed an employee to work beyond retirement age.

Had the complainants' retirement age been altered by the collective agreement one might have considered it possible that the union was a party to the Borough's breach of the Code, though that conclusion is not obvious nor one that I need reach.

Nor need I consider whether, had the union been responsible in fact for the complainants' plight, it would have been liable under s. 4(1)(g) or 4a(1).

REMEDY

Provided the complainants still possess the requisite physical and mental capacity to carry out their jobs they are entitled to be reinstated. They are also entitled to the salary that they would have received from

the date of their retirement until the date of their reinstatement. This is not an award of damages for breach of contract since, in fact, the Borough was complying with its contractual obligations. Rather, it is an award of salary of which the complainants were improperly deprived by reason of a breach of the Human Rights Code. Nevertheless, it is proper that deductions be made from the award in respect of the pension payments received by the complainants and in respect of contributions that would have been made by the complainants to the pension plan. In addition, earnings which the complainants received from other sources which they could not have earned had they been employed by the Fire Department should be taken into account. If the amount payable cannot be satisfactorily determined among the parties, the Board would be prepared to reconvene to consider the matter.

Dated at Toronto this 21st day of July, 1977.

Bruce Dunlop.